

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

BUCHANAN MARINE, L.P.

Employer/Petitioner

and

Case No. 29-UC-570

LOCAL 333, UNITED MARINE DIVISION,
INTERNATIONAL LONGSHOREMEN'S
ASSOCIATION, AFL-CIO

Union¹

DECISION AND ORDER

Buchanan Marine, L.P., herein called the Employer, a Delaware corporation, is engaged in the interstate transportation of aggregate via its tug boats and barges. Since at least 1990, Local 333, United Marine Division, International Longshoremen's Association, AFL-CIO, herein called the Union or Local 333, has represented a bargaining unit of the Employer's captains, mates, engineers and deckhands who are engaged in work in the geographical areas set forth in Article I² of the most recent collective bargaining agreement between the Employer and the Union.

On March 25, 2010, the Employer filed the instant unit clarification petition under 9(b) of the National Labor Relations Act, herein called the Act, seeking clarification of the placement of its captains in the bargaining unit. The Employer contends that its

¹ The Union's name appears as amended at the hearing. See Board Exhibit # 2.

² The area covered consists of the New York Harbor and vicinity, including the Hudson River, Long Island Sound and its tributaries to the eastern coast of the United States from Maine to a terminal point in or north of Norfolk, Virginia.

captains are supervisors within the meaning of Section 2(11) of the Act and therefore should be excluded from the unit. The Union takes the position that the captains are statutory employees. The only issue in this case is whether the captains are statutory supervisors.

A hearing on this issue was held before Tabitha Boershinger, a Hearing Officer of the National Labor Relations Board, herein called the Board. In support of its contentions, the Employer elicited testimony from its labor attorney during 1990 contract negotiations, Alfred Vadnais, Vessel Compliance and Safety Manager Edward Grzybowski, Tug Personnel Manager Robert Haab and Sustainability and Business Development Manager Stephen Mitchell. The Union called Employee Thomas Cutten, Captain Joseph LoPiccolo, Local 333 Director of Special Projects Steve Oravets and Local 333 President and General Manager William Harrington to testify. Both parties filed briefs. Pursuant to Section 3(b) of the Act, the Board has delegated authority in this proceeding to the undersigned.

I have considered the evidence, stipulations and the positions of the parties. For the reasons noted herein, I have concluded that the Employer's tugboat captains are not statutory supervisors as defined by the Act and that the captain position appropriately belongs in the bargaining unit. Accordingly, I deny the Employer/Petitioner's petition to exclude this classification from the bargaining unit.

FACTS

Background including bargaining history

In 1985, the Employer and about 11 other employers were parties to a multi-employer collective bargaining agreement between Tug and Maritime Employers

Association and Local 333. Thereafter, the Association “collapsed” and the Employer began negotiating with Local 333 on an individual basis. According to Employer labor attorney Vadnais, during 1990 negotiations, the Employer took the position that captains were supervisors within the meaning of Section 2(11) of the Act and thus excluded from the unit. Local 333’s position was that they should remain in the unit. The negotiations resulted in the Employer’s agreement to continue to include the captains in the bargaining unit. Further, the parties agreed that the scope of the bargaining unit was limited to the work of towing aggregate within a specific jurisdictional area and the management rights provision of the contract was expanded to give the Employer greater control over the operations. Vadnais contends that the agreement to include captains in the bargaining unit did not change the Employer’s position that they were statutory supervisors. Vadnais admits that the purpose of expanding the Management Rights Clause during the 1991 negotiations was to restrict the captains’ responsibilities. Similarly, according to Vadnais, Section 10.2 of the collective bargaining agreement, stating that, “While operating or on board the Company’s owned and operated equipment or vessels, the covered employees shall be under the direction of and subject only to such person or persons as the Company may designate and appoint,” was an effort to limit the authority of the captains. However, according to Vadnais, when the boat is out on the water, the employees are under the direction of the captain.

The parties stipulated that at all material times, since at least 1990, the Union has been the designated exclusive collective bargaining representative of the unit described above. The most recent collective bargaining agreement between the Union and the

Employer covering unit employees extended from March 26, 2007, until midnight February 13, 2010. This agreement was extended by mutual consent to March 8, 2010.³

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The Employer is engaged in the towing of aggregate, which is basically gravel and stone. The Employer deals with three main quarries—Clinton Point in New York, Haverstraw in New York and Pine Orchard in Connecticut. The aggregate is loaded into barges and a tow or a single barge or group of barges is formed. The barges are towed to the Employer's moorings and then delivered to customer docks, one or more at a time, depending on what the customer orders. The Employer has 24 hour boats that operate 24 hours a day for up to seven days. The 24 hour boat is also referred to as a day boat when it runs the operation for one day. There are two mechanically different types of vessels, the tugboat and the tow boat. Generally, there are 6 crewmembers on Employer tug vessels consisting of one captain designated as the master of the vessel,⁴ one mate, one engineer and three deckhands. Trainees may also be assigned. The mate acts for the captain in his absence and is on watch when the captain is not on duty. The mate navigates the vessel, makes up the tow, and supervises personnel. The mate has some medical management duties that are independent of the duties that he shares with the captain.⁵ The engineer is responsible for the operation and maintenance of the propulsion plant making sure that the engines run, that they have electrical power, that the toilets flush and that they have running water. The engineer reports fuel levels to the captain.

³ The timeliness of the petition was not raised as an issue.

⁴ The person holding the position of captain on a vessel is also referred to as a Master. An individual can be a captain according to license but may not be the Master of the vessel inasmuch as that individual may be serving in a different position on the vessel at the time. For example, as in the case of witness Thomas Cutten, an individual can be a captain by license but currently serving in the position of mate on a vessel.

⁵ Union witness Cutten testified that as a mate he is responsible for medical supplies on the boat. The Employer's mates are trained on the defibrillator.

Deckhands are basically sailors who make up the tow lines,⁶ fish lines out of the water for moorings and attach them to barges, cook, clean and perform heavy lifting. Deck hands also keep a look out with either the captain or the mate, and inspect the deck during their watch. Trainees are individuals who are below skill level being trained to become deck hands.⁷ The positions of mate and captain require special licensing.

The Employer's Vice President from Marine Transportation, Jerry Weldon, is the direct supervisor of the captains. There is general testimony that captains "supervise" crew members.⁸ The Employer contends that 6 captains could potentially be affected by the instant UC petition.

In 2007, the Employer implemented its Safety Management System Policy & Procedures Manual or "SMS" in response to expected future regulations to be implemented by the United States Coast Guard. According to Vessel Compliance and Safety Manager Edward Grzybowski,⁹ since the Employer's implementation of the Safety Management System in 2007, captains' duties and responsibilities increased.¹⁰ In this regard, according to Grzybowski, captains have more administrative responsibilities inasmuch as the reports they are required to do are more formalized and there is more oversight by the Employer. General, personnel, equipment, operational and

⁶ They perform actual line handling, i.e., tie barges to the tug, tie barges to one another and tie barges to the docks. The number of barges changes with the order; Captain LoPiccolo testified that it could be one barge, it could be two barges, and it could be sixteen barges.

⁷ Tug Personnel Manager Haab testified that when the Employer was busier in past years and could not get enough qualified personnel to work, they would bring in a trainee.

⁸ The Employer's Safety Management System Manual also lists supervising crew members as a responsibility of the captain.

⁹ Grzybowski began working for the Employer in December 2005.

¹⁰ Prior to the Safety Management System Policy and Procedure Manual, there was a company manual which was under 20 pages. Earlier policy documents were either incorporated into the Safety Management System or made obsolete by virtue of the Safety Management System. The Employer admits that certain duties and responsibilities of captains have not changed but contends that "accountability" has changed.

administrative responsibilities of captains are set forth in the Employer's Safety Management System Manual. For example, the captain is required to ensure that all company policies, rules, regulations and all laws are followed by personnel under his supervision (i.e., the mate, engineer, deck hands, and any trainees). The captain is required to report all violations of the Employer's policy or violations of law. The captain is responsible to make sure that specific requirements are carried out by the crew. The captain is responsible to ensure that the vessel has a full crew when operating. If there is not a full crew, the captain has the authority to cease operations until a full crew is obtained. In this regard, according to the testimony of Captain/Mate Thomas Cutten, if someone becomes ill on the ship and needs medical attention, the captain advises the Coast Guard and dispatch. The Employer would then make arrangements for the person to get to a dock or to a medical facility. If the sick crew member does not need transport to a medical facility but is too ill to perform his duties, the captain calls dispatch and the Tug Personnel Manager arranges for a replacement crew member. The vessel cannot operate without a full crew complement. The captain must post a station bill¹¹ and ensure that all crewmembers are familiar with their respective stations and duties in case of an emergency.

The captain's responsibilities also include directing the crew while organizing the tow line, monitoring ship traffic and safely navigating the boat. The captain can spend one or two hours to assemble the barges, closely interacting with the crew at this time. At times, an entire watch may be spent navigating the ship. Weather, the number of barges being pushed and the weight of the barges are taken into account by the captain in

¹¹ A station bill is a summary of each individual's duties/responsibilities in case of emergency conditions, such as fire, flooding or grounding.

navigating the boat. In this regard, the record indicates that a captain can use his discretion to assign one or more lookouts. All crew members are trained to be lookouts. The captain can decide when to assign a look out, i.e. when visibility is one quarter of a mile, and where to post the lookout. The captain decides who he wants to use as a lookout, i.e., someone on watch already or someone who was not on watch, i.e., a deck hand on standby. The captain may also ask a deck hand to “ride a barge” if visibility is poor and he needs the lookout to see a dock. Further, according to employee Cutten, when he was a captain, he directed deckhands to take a pump out to a scow¹² in tow and pump it out if it had water in it. This work would be assigned to the deck hand on watch or the deck hand on standby. In this regard, the record evidence indicates that the crewmembers know what they are supposed to do.

The Employer requires the captains (masters) to obey all Coast Guard Rules and Regulations. In this regard, there are Federal regulations with respect to the length of a tow hawser.¹³ The tow hawser is handled by the deck hands. If a hawser is incorrectly handled by the deck hands, the captain is subject to having his license suspended for violating regulations under U.S. code stipulations. Further, the captain is responsible to prevent the pollution of waters and if a deck hand mishandles refuse, the captain can be penalized. The record does not specify how the captain is penalized and there is no probative evidence as to whether the Employer penalizes the captain in addition to the Coast Guard’s action taken against the captain.¹⁴

¹² A scow is a barge.

¹³ A tow hawser is a line or rope made of natural or synthetic fiber that is used to connect the tug boat with whatever it is towing.

¹⁴ With regard to the pollution of waters, Union Director of Special Projects Steve Oravets “imagines” that the Employer would take unspecified action against the captain.

The captain is ultimately responsible for ensuring that the proper machinery and equipment is on the vessel. Based on a requirement for the captain/master to review certain types of systems on board the vessel to certify their condition prior to the vessel getting underway, the captain is responsible to fill out and sign pre-underway check sheets.¹⁵ The record indicates that the pre-underway check list is completed by both the captain and the engineer. The pre-underway checklist indicates that if any of the items checked are unsatisfactory, the captain should call the port engineer or the vessel compliance and safety manager prior to getting underway. According to Stephen Mitchell, Sustainability and Business Development Manager, the captain has the authority to refuse to sail if the vessel is not ready to proceed. In this regard, in mid February 2010, Stephen Mitchell, Sustainability and Business Development Manager observed Captain Rod Bissen exercise his authority to delay a vessel from sailing. More specifically, Captain Bissen asked the shipyard superintendent to raise the height of the tires that surround the perimeter of the boat, which delayed the tug by about three hours.¹⁶

The captains “sign off on” or approve voyage plans¹⁷ and the captain’s oil transfer authorization.¹⁸ If the captain delegates his authority to sign off on these forms, he remains responsible for everything that happens on the vessel as master of the

¹⁵ The pre-underway check sheets were developed by Vessel Compliance and Safety Manager Edward Grzybowski after he became employed by the Employer in December 2005.

¹⁶ I do not rely on the substantial hearsay explaining the intermediate steps involved.

¹⁷ This is a plan made in preparation of a trip from point A to point B. Considerations in the plan include weather conditions, tides, currents, overhead clearance if they are going to transit any bridges, the configuration of their tow, i.e., how big it is and whether they are going to push or pull it. Both the captain and the mate sign the voyage plan; however, the captain is ultimately responsible.

¹⁸ Typically the person in charge of the refueling operation is the engineer. The captain is responsible for monitoring the engineer in this operation. He also watches traffic, etc. from the wheelhouse. He has the authority to start (and stop) the refueling operation. The captain can delegate the authority to sign off on the oil transfer authorization to the mate.

vessel. The captain is required to make sure crew members receive an initial orientation when they come on board the vessel.¹⁹ The captain has the authority to deny access to a crew member if he does not possess proper documentation to board. The captain is a direct representative of the Employer aboard the vessel. The record indicates management and the captain are in communication while the vessel is at sea.

The Employer's Safety Management System Manual also provides that captains shall publish standard operating procedures, standing orders and night orders. Standing orders are instructions given to the crew by the captain which are to be followed unless instructed otherwise, i.e., an hourly check of the engine room, wear work vests, check on the captain or mate every hour, dinner is always at 6:00 p.m. Standing orders for mates could include a requirement to call the captain if there is poor visibility or inclement weather or an injury.²⁰ Different captains may have different standing orders. Captains do not have to consult with management about their standing orders. Standard Operating Procedures are similar but are more of a procedure with steps to follow. The Employer provides captains with guidance in the preparation of their Standard Operating Procedures. In this regard, Grzybowski gives the captain a draft for their review, which the captain ultimately "takes ownership of." Night orders are usually instructions for the watch in the wheelhouse when the captain is asleep or otherwise not available, i.e., advise the captain if visibility is reduced and keep certain distance from other vessels.

Vessel Compliance and Safety Manager Grzybowski testified that according to the Federal Drug Testing Program and Employer policy, captains are responsible to make an assessment as to whether there is reasonable cause to do a drug test on an individual.

¹⁹ Crew members who have not been on the boat for "a while" would need orientation.

²⁰ Grzybowski refers to standing orders as one-liners and the do's and don'ts.

However, the record does not contain any examples and Grzybowski had no personal knowledge of a specific case where a captain recommended a reasonable cause drug test.

The day is divided up into four 6-hour shifts, also known as watches. Captains work two 6 hour shifts in a 24 hour day, i.e., the captain is on duty for six hours, then off duty for six hours, on duty for six hours and off duty for six hours. During the time periods the captain is off duty, the person on watch is the mate. The mate's decisions are guided by the captain's standing orders, night orders, the voyage plan, coast guard regulations and the company's Safety Management System manual. A captain may give the mate more authority where the mate is experienced and the captain feels comfortable with him.

According to the Employer's Safety Management System manual and the testimony of Vessel Compliance and Safety Manager Edward Grzybowski, the captain sets the watch. Grzybowski explained that the hours are set based on the work the individual performs. For example, the Safety Management System Manual provides that the captain stands two six hour watches per day, 6:00 a.m. to noon and 6:00 p.m. to midnight. Thus, the captain comes on for the morning watch and the mate goes to bed. The engineer typically works the same time as the captain and the three deck hands work out a rotation based on their last trip. The captain will resolve any scheduling disputes.

The captain completes a daily payroll memorandum and log sheets that record the hours that crew members have worked. The captain submits the time sheets to Tug Personnel Manager Haab who passes them on to the human resources manager.²¹ There are regulations that cover the maximum hours that licensed personnel can work. For

²¹ The record also indicates that captains now submit the weekly payroll sheets electronically.

example, the captain and the mate cannot work more than 12 hours per day.²² Further, Safety Management System guidance limits deck hands to 15 hours per day. The record also indicates that if an engineer fuels on their off-watch period, which entitles the engineer to three hours pay under the collective bargaining agreement, such would be out of the ordinary and the captain would have to contact dispatch for prior approval. According to Thomas Cutten who served as a captain for the Employer, filling out the payroll documents is relatively simple inasmuch as crew members generally work the same number of hours, day in and day out.

Tug Personnel Manager Robert Haab hires and fires personnel and makes sure tugboats have personnel scheduled for work for the coming week. Haab testified that captains are not involved in hiring. When serving as captains for the Employer, LoPiccolo and Cutten never hired any employee. With regard to effectively recommending hiring, Cutten testified that he was solicited by Captain John Brooks to work for the Employer. In response to a leading question, Cutten testified that to the best of his knowledge, Brooks effectively recommended his hire.

In the past, when the Employer was busier, the Employer could not get enough qualified personnel to work on board, so the Employer hired below skill level trainees. The Employer trained these individuals and assigned them to a vessel on a non-permanent basis. Captains evaluated trainees after a certain number of trips aboard the vessel. Tug Personnel Manager Haab testified that with respect to permanently hiring trainees, the Employer would consider the captain's evaluation of the trainee. If the

²² The Safety Management System Manual also limits the number of hours that captains and mates can work to 12 hours per day.

trainee was more qualified than the Union recommended applicant,²³ the Employer would hire the trainee that they felt was qualified as a permanent employee, which is largely²⁴ based on the captain's evaluation of the trainee. In this regard, it is noted that Haab also testified that a captain may advise management that the trainee was ready for hire but if there is no position, the trainee would not be permanently hired. The Employer provided documentary evidence of Employee Evaluation Forms that rate the skills and attitude of employees. (Employer Exhibit #12) Three of these evaluations specifically designate the individual being evaluated as a trainee. It appears that the September 2006 evaluation of Trainee Bob Stanton recommends more time as a trainee;²⁵ the April 11, 2006 evaluation of Trainee Steven Sandland states that he "will be ok to try...should do ok as long as he is with one experienced deckhand;" and the evaluation of Trainee Jose Delgado states, "his line throwing from the tug is good- he would benefit greatly from the deckhand manual...will need more help in areas of safety." Another evaluation that does not list a position for the individual being evaluated (Mark Mileto) states, "needs a few more trips so as to enhance basic skills." ²⁶ Employer action taken, if any, with respect to each of

²³ Article 5 of the collective bargaining agreement provides that, when a vacancy exists in one of the job classifications covered by the contract, which is not filled through recall or promotion procedures in the contract, the Union will be given the first opportunity to refer an experienced, qualified and competent applicant to fill the vacancy.

²⁴ Haab estimated that the Employer's decision is 90% based on the captain's evaluation of the employee.

²⁵ "With more trainee time, I believe Bob will make a good deckhand."

²⁶ One could speculate that a few of the other evaluations where the position of the individual is listed as "deckhand" or "deck" could actually be evaluations of trainees inasmuch as they include references to the training process or comment that the individual is ready to be a deckhand. But, such references could also pertain to training of new employees who were already hired as deckhands. However, the record testimony does not address this issue. Rather, Tug Personnel Manager Haab testified only that the evaluations in the record were mostly for deckhands and that there were also evaluations of trainees and one evaluation of a mate.

these evaluations is unclear.²⁷ Haab also testified that he takes recommendations of all good employees into consideration when making hiring decisions, i.e., deckhands, engineers, mates and captains may refer a friend for work and he takes their recommendations into consideration.

Similarly, with regard to the authority to reward and promote employees, Tug Personnel Manager Haab testified that captains cannot promote an individual to another position. However, Haab testified, without providing specific examples, that in the past he accepted a captain's recommendation to promote a crew member. In this regard, the evidence shows that, on occasion, upon the request of management, captains evaluated employees and commented on whether the employees should advance or not.²⁸ For example, according to Captain LoPiccolo, in 2005-2007, when the Employer was busier, Tug Personnel Manager Haab asked him to perform evaluations of trainees because the Employer wanted to acquire more men. (See above-mentioned paragraph concerning the hire of trainees.) Further, a few years ago, Tug Personnel Manager Haab requested that some evaluations be performed by the captains because they wanted to see who was ready to move up to a wheelhouse position, i.e., captain or mate position.²⁹ There is no evidence that anyone was promoted from such evaluations. Finally, Tug Personnel Manager Haab testified, in response to a question as to whether captains can reward other

²⁷ While a compound question as to "...did those evaluations result, actually result in *either* trainees being retained by Buchanan or considering deck hands for promotion?" was answered affirmatively, it is unclear as to whether and when the three trainee evaluations "resulted" in any of the individuals whose evaluations were part of Employer Ex. 12 being hired by the Employer or the process involved. I note that Tug Personnel Manager Haab testified that Bob Stanton, whose evaluation is in evidence as Employer Ex. 12, is still an active employee and "pursuing his license." As noted above, the evaluation in evidence for Stanton appeared to recommend more trainee time for Stanton rather than immediate permanent hire as/promotion to deckhand.

²⁸ The Employer does not require evaluations on any set time period; in fact Tug Personnel Manager Haab has not asked captains to do evaluations for about 2 to 4 years, inasmuch as the Employer does not have open positions to fill.

²⁹ Haab testified that this occurred between two to five years ago.

employees, that captains can contact him to give an employee a good evaluation and tell Haab that the employee is ready to change positions.³⁰ Some of the evaluations in the record do not contain any recommendations with respect to employment.³¹

Layoffs are determined by seniority. Captains cannot order time off; only management has the authority to order time off.

Tug Personnel Manager Haab testified that captains have the authority to discharge employees and that he has informed the captains throughout the eight years he has been there that they have that authority. While Haab could not provide any specific example of a captain terminating an individual, Captain Lo Piccolo testified concerning an incident where he summarily fired an employee without first consulting management because the employee screamed and cursed at the captain in front of the crew. Captain LoPiccolo advised management about the incident and was instructed to go back to the Port Washington home base. Management called him and asked questions about the incident and told him that the Employer would stand by him on his decision. LoPiccolo testified that this was an exception to the normal protocol of providing a verbal warning first, then provide written warning(s), then third to confer with management and have a meeting prior to taking any further action. According to Captain Lo Piccolo, even though management backed him on the discharge of this individual for insubordination, he understood that he should have first sought management's approval.

³⁰ In this regard, Haab could not recall any specific examples where a captain recommended to him that an employee be promoted or told him that an employee had done good work.

³¹ Some of the evaluation forms do not contain any comments in the space provided for "written evaluation." Others report observations and/or opinions such as "...has applied himself to all aspects of the training process. He got up for every job and is a fast learner;" "progressing very well. He is a hard worker and tries to do the job properly at all times," "definitely has the foundation of this kind of work under control... He does however need to work on the details...Performance he has displayed is one who wants the job. In my opinion his talent will only expand."

With regard to the authority to discipline, the record contains a “Record of Verbal Counseling” issued to Frank Bonislawski and a “Written Warning” to Craig Golden. (Employer Ex. 8) With regard to the verbal counseling, in October 2005, deckhand Bonislawski was warned concerning his failure to follow instructions, insubordination and insolence. Tug Personnel Manager Haab signed off on the document. Tug Personnel Manager Haab testified that he met and spoke with the captain and employee Bonislawski about the incident.³² The document in evidence indicates that during a follow-up discussion, Captain LoPiccolo warned Bonislawski that if happens again, he will ask that Bonislawski be placed on another vessel. This record of verbal warning was placed in Bonislawski’s personnel file. The warning had no impact on the employee’s pay or promotion possibilities. With regard to the “Written Warning,” this document was issued to Mate Golden after a meeting was held on September 10, 2007, regarding his behavior. Personnel Manager Haab signed off on the warning as “Supervisor” on September 25, 2007. Haab is also listed at the top of Golden’s warning as “Supervisor.” Captain LoPiccolo wrote a summary, dated September 16, 2007, memorializing “his take on what happened at the meeting.”³³ In this regard, Captain LoPiccolo’s deckhands complained to him about the conduct of Mate Golden. LoPiccolo brought the matter to the attention of Tug Personnel Manager Haab and arranged a meeting with management. Present at the September 10, 2007, meeting were Tug Personnel Manager Haab, Vice President of Marine Transportation Weldon, Captain LoPiccolo, mate Golden and crew members Bonislawski, Magillen and Lowe. At the meeting Vice President Weldon

³² The captain brought the problem to Tug Personnel Manager Haab’s attention. According to Haab, the captain recommended that Bonislawski be moved from his vessel.

³³ Captain LoPiccolo testified that management requested him to write this letter after the meeting took place.

verbally reprimanded Golden. Captain LoPiccolo stated that Golden's behavior would not be tolerated.

The Employer's practice is to place documented warnings in the employee's personnel file and take the warning into consideration if there is additional disciplinary action to be taken.³⁴ There is no evidence that such warnings would have an impact on pay or promotion opportunities. According to Tug Personnel Manager Haab, the Employer does not have a three strike policy; the Employer tries to work things out with its employees.

The record also indicates that captains correct the work of crew members so they understand their job. When serving as a captain, Cutten corrected crew members primarily on the safety of the boat and making sure there were enough people on deck when he needed them. Cutten characterized this as a correction to make sure individuals understood their job rather than discipline. Cutten responded affirmatively when asked whether he used independent judgment about bringing such corrections to the attention of management. Similarly, Captain LoPiccolo testified if a trained crew member could not perform a necessary job that could impact the safety of the vessel, he would have to advise management.

With regard to effectively recommending discipline, according to Tug Personnel Manager Haab, captains have made him aware of circumstances where they did not take discipline directly but asked Haab to carry it out. In this regard, Personnel Manager Haab testified that based on captains telling him that certain individuals were late, he would issue verbal warnings and create a record of verbal counseling. The "Record of Verbal

³⁴ Although Haab did not know how long such documents remain in the employee's personnel file, this October 31, 2005 warning was still in Golden's personnel file.

Counseling” concerning such verbal warnings is kept in the employee’s personnel file.³⁵ The Employer provided five documents entitled “Record of Verbal Counseling” in connection with certain named employees reporting to work late on various dates in 2006 and 2007. These documents are not signed by any Employer official. Tug Personnel Manager Haab’s testimony indicates that he verbally warned the crewmembers based upon the captains advising him that crew members were late.³⁶ Further, with regard to captains recommending discipline, Tug Personnel Manager Haab testified that captains do not ask for crew members to be terminated but rather they ask him to move the crew member to another tugboat. In this regard, Haab testified that “at times” the Employer has acted on recommendations to transfer a crew member. For example, a captain requested crew member Golden be moved to another vessel; Golden was moved to Captain LoPiccolo’s vessel.³⁷ At a meeting, Golden was told by management that this was his last chance. On the other hand, Tug Personnel Haab also recalled a captain recommending that a deck hand be moved off of his vessel for, among other things, urinating on a toilet seat. Haab did not transfer that employee. Tug Personnel Manager Haab testified that he told the captain if the deck hand continued with the behavior, he could terminate the deck hand. The captain did not terminate the deck hand. Finally, although not entirely clear, Haab’s testimony concerning the October 2005, verbal counseling of deckhand Bonislowski indicates that the captain recommended moving

³⁵ According to Tug Personnel Manager Haab, if there are further incidents, they could be added together but if nothing further happens, it means nothing.

³⁶ In response to a leading question, Haab indicated that captains asked him to carry out this discipline for them. However, on further explanation, he testified that when he was in New York with the tug boats on Monday mornings, “people” asked why certain tug boats were still there, the captain would bring the crew members lateness to his attention, and he would write up the record of verbal warning.

³⁷ According to the testimony of Captain LoPiccolo, he was informed that Engineer Dalton complained about Golden and Golden was removed from the previous boat.

Bonislawski from his vessel. Haab, Captain LoPiccolo and Bonislawski met and they tried to “make it work.”³⁸

Beginning in about March of 2008, the Employer introduced an incentive program for captains.³⁹ The incentive program rates captains, on a monthly basis, on five critical areas. For each criteria that is met for a given month, the captain can earn \$180, thus there is a potential to earn \$900 extra per month. Managers are eligible to receive incentives under the Employer’s incentive programs but mates, engineers and deckhands do not receive such incentives.

The Captain shares a room with the mate.

Discussion:

Section 2(11) of the Act defines the term “supervisor” as:

“..any individual having the authority, in the interest of the Employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.”⁴⁰

Thus, an individual is a statutory supervisor if (1) they hold the authority to engage in any 1 of the 12 supervisory functions listed in Section 2(11); (2) their “exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment”; and (3) their authority is held “in the interest of the employer.”

NLRB v. Kentucky River Community Care, 532 U.S. 706, 713 (2001); *American River*

³⁸ The record of verbal counseling indicates that the captain told Bonislawski if there was another “episode” he would ask that Bonislawski be placed on another vessel.

³⁹ Sustainability and Business Development Manager Stephen Mitchell testified that in the middle of 2007, the Employer hired an outside company to look at the efficiency of its operations and that company recommended captains be included in the incentive program with other managers because they were key in implementing the changes to improve efficiency.

⁴⁰ 29 U.S.C. Section 152(11) (1982).

Transportation Co., 347 NLRB 925 (2006). Supervisory status may be shown if the putative supervisor has the authority to either perform a supervisory function or to effectively recommend the same. *Croft Metals, Inc.*, 348 NLRB 717 (2006).

In *Kentucky River*, *supra*, the Supreme Court reaffirmed that the burden of proving supervisory status rests on the party asserting it.⁴¹ Where the evidence is in conflict or inconclusive on particular indicia of supervisory authority, the Board will find that supervisory authority has not been established on the basis of those indicia. *Phelps Community Medical Center*, 295 NLRB at 486, 490 (1989).

In the *Oakwood* line of cases,⁴² the Board refined its analysis of the terms “assign,” “responsibly direct” and “independent judgment” within the meaning of Section 2(11). More specifically, the Board interpreted the term “assign” to mean “the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee... In sum to ‘assign’ for the purposes of Section 2(11) refers to the designation of significant overall duties to an employee, not to the ... ad hoc instruction that the employee perform a discrete task.”⁴³ See *Oakwood Healthcare, Inc.*, 348 NLRB 686 at 689.

⁴¹ However, the Court rejected the Board’s interpretation of “independent judgment” in Section 2(11)’s test for supervisory status, i.e., that alleged supervisors do not use “independent judgment” when they exercise ordinary professional or technical judgment, or judgment based on greater experience, in directing less-skilled employees to deliver services in accordance with employer-specified standards. Thus, the Board must seek to interpret the statutory distinction between “routine” and “independent” judgment, without categorically discounting judgment based on professional/technical expertise or greater experience.

⁴² *Oakwood Healthcare, Inc.*, 348 NLRB 686, *Croft Metals, Inc.*, 348 NLRB 717, and *Beverly Enterprises-Minnesota, Inc., d/b/a Golden Crest Healthcare Center*, 348 NLRB 727 (“*Golden Crest*”), all issued on Sept. 29, 2006.

⁴³ The Board explains that if a charge nurse designates an LPN to be the person who will regularly administer medications to a patient or a group of patients, the giving of that overall duty to the LPN is an assignment. On the other hand, the charge nurse’s ordering an LPN to immediately give a sedative to a particular patient does not constitute an assignment.

“Directing” employees means generally overseeing them, deciding what task shall be undertaken next and who shall do the task, including *ad hoc* instructions to perform discrete tasks. *Id.* at 692. The Board interpreted the phrase “responsibly to direct” to include an element of accountability. “[T]o establish accountability for the purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.” *Id.* at 692, emphasis added. *See also Schnurmacher Nursing Home v. NLRB*, 214 F.3d 260 (2nd Cir. 2000) (charge nurses found to be supervisory, in part, because they were disciplined for failing to direct the assistants properly in providing patient care).

Further, the Board in *Oakwood* interpreted “independent judgment” as follows:

[T]o exercise ‘independent judgment’ an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.... [W]e find that a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.... On the other hand, the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices.... Thus, ... [t]he authority to effect an assignment, for example, must be independent [free of the control of others], it must involve a judgment [forming an opinion or evaluation by discerning and comparing data], and the judgment must involve a degree of discretion that rises above the ‘routine or clerical.’

Croft Metals, 348 NLRB 717 at 721, citing and summarizing *Oakwood*, *supra*. (internal citations omitted). Thus, the Board explains that a nurse who must weigh employees’ different skill levels and training in assigning them to patients uses independent judgment. However, if there is “only one obvious and self-evident choice” (e.g., a charge nurse assigning the one available nurse who knows American Sign Language to a

patient who required ASL to communicate), or when the assignment is made solely on the basis of “equalizing workloads,” the assignment is merely routine or clerical. *Oakwood*, at 689-690. ⁴⁴

Here, the Employer contends that captains should be excluded as supervisors within the meaning of the Act. There is no evidence, and the Employer does not contend, that captains have the authority to suspend, layoff or recall other employees or to adjust their grievances. However, the authority to hire, transfer, reward, promote, discharge, assign, discipline and responsibly direct other employees and/or effectively recommend such actions will be discussed further herein.

I note that the Board has held that where timely filed, a UC petition seeking to exclude a classification based on supervisory status may be processed even though the disputed classification has been historically included. *The Washington Post Company*, 254 NLRB 168 (1981) (where a UC petition to exclude certain classifications was processed despite their historical inclusion in the unit); *Goddard Riverside Community Center*, 351 NLRB 1234 (2007). In *The Washington Post Company*, the Board held that where employees sought to be excluded by a UC petition have long been included under previous contracts, and the job duties of those positions have remained unchanged, if it can be shown that those employees meet the test for supervisory status, the Board is compelled to exclude them. Here, the evidence shows that since at least 1990, the Union has been the exclusive collective bargaining representative of the unit which includes captains. The record does not contain evidence that the Employer specifically agreed, in a representation hearing, to the inclusion of the captains in the unit and is now attempting

⁴⁴ With regard to the assessment of skills, see also *American Commercial Barge Line Co.*, 337 NLRB 1070 (2002). With regard to equalizing workloads, see also *Franklin Hospital Medical Center*, 337 NLRB 826 (2002).

to exclude the classification on supervisory grounds. See *Goddard Riverside Community Center*, *supra* at fn. 6 (2007) (where the Board noted that the fact that the team leaders were included in the unit by way of the contract did not mean that their status had been specifically agreed upon in the representation proceeding.) Compare *Premier Living Center*, 331 NLRB 123 (2000). Further, the contract expired February 13, 2010, and the petition in the instant case was filed on February 25, 2010.⁴⁵ There is no contention that the petition was filed untimely during the term of the collective bargaining agreement. In these circumstances, the bargaining history and prior contract of the parties are not determinative of the status of the captains if their exclusion is required by the statute.

The evidence shows that the outline of the captains' duties and responsibilities set forth in the Employer's Safety Management System include "supervising" and evaluating personnel performance. (Employer Ex. 1, Section A) Further, there is testimony by Vessel Compliance and Safety Manager Grzybowski and others that the captain is the direct supervisor of crew members on the vessel. Even assuming captains are referred to as supervisors and the Employer's manual sets forth duties and responsibilities of the captain, "Board law is clear that the mere use of a title or the giving of 'paper authority' which is not exercised does not make an employee a supervisor." *Sunset Nursing Homes, Inc., d/b/a North Miami Convalescent Home*, 224 NLRB 1271, 1272 (1976). See also, *Oakwood Healthcare*, *supra*, at fn. 24 (rather than job titles and descriptions, the Board looks to the authority actually possessed and the work actually performed by the alleged supervisor); *Loyalhanna Health Care Associates*, 352 NLRB 863 (2008) (employer prepared job descriptions are not controlling; what matters are the authority that an

⁴⁵ The parties stipulated that the agreement was extended by mutual consent to March 8, 2010.

individual actually possesses and the work that the individual actually performs). And, while there is no other individual in charge on the vessel, the absence of statutory supervisors on boats does not necessarily confer any greater authority on captains. See e.g. *Chevron, U.S.A., Inc.*, 309 NLRB 59 (1992) (where it was found that the absence of statutory supervisors on the boats do not confer any greater authority on the launch captains, noting that the shore-based supervisors may be contacted at any time by radio or telephone). Thus, the supervisory authority actually possessed and functions actually performed by captains must be analyzed.

With regard to the authority to hire employees, there is no probative evidence that captains have the authority to hire employees. Indeed, the Employer's Tug Personnel Manager testified that captains are not involved in hiring. With regard to effectively recommending employees for hire, in response to a leading question, employee Cutten testified that to the best of his knowledge, a captain effectively recommended that he be hired by the Employer inasmuch as he was solicited by a captain to come to work for the Employer. However, this hearsay evidence is insufficient to prove that captains effectively recommend hiring. Further, the record contains copies of the evaluations of three trainees and there is testimony of Tug Personnel Manager Haab that the Employer relied heavily on captains' evaluations of the trainees in deciding on whether to hire them in a permanent position as a deckhand.⁴⁶ However, this conclusionary testimony lacks specific details as to the action taken, if any, by the Employer in response to the trainee evaluations in evidence, i.e., a description of the Employer's handling of the evaluation

⁴⁶ In response to a leading question regarding whether the Employer relied on evaluations to consider employees for permanent positions, Tug Personnel Manager Haab responded, "In a large part, yes...", and he indicated that he trusted the captain's recommendations because they were on board and he was not. When asked whether the evaluations resulted in trainees being retained by the Employer, Tug Personnel Manager responded, "Absolutely."

including the names of the management officials involved in the decision making process, the names of the trainees who were evaluated that received a permanent position as a deck hand in response to the evaluation and the date thereof.⁴⁷ In this regard, while Tug Personnel Manager Haab referred to one employee, Robert Stanton, as an individual who moved from a trainee into a deckhand position and is still employed by the Employer, the captain's evaluation of Trainee Stanton appears to recommend more time as a trainee rather than an immediate hire/promotion to a deckhand position.⁴⁸ Thus, there is insufficient evidence to establish that the captain's evaluation effectively recommended his ultimate hire into the permanent position. Further, even if the captain's evaluation is the main criteria for the Employer to permanently hire a trainee as a deck hand, the record indicates that the Union has a right of first referral and the Employer considers, evaluates and compares the trainee's qualifications with those of the applicant referred by the Union, in which the captains play no role.⁴⁹ Accordingly, in my view, the trainee evaluations performed by captains, which are reviewed, compared and evaluated by upper management, do not rise to the level of conferring supervisory status. See e.g. *Chevron, U.S.A., Inc.*, 309 NLRB 59 (1992) (where recommendations set forth in performance evaluations submitted to management by launch captains did not constitute

⁴⁷ While a compound question as to "...did those evaluations result, actually result in *either* trainees being retained by Buchanan or considering deck hands for promotion?" was answered affirmatively, it is unclear as to whether the evaluations "resulted" in any of the individuals whose evaluations were part of Employer Ex. 12 being hired by the Employer or the process involved.

⁴⁸ In fact, Captain LoPiccolo indicated in the September 8, 2006, evaluation that, "With more trainee time, I believe Bob will make a good deckhand." The record does not contain another evaluation of Stanton while still a trainee wherein it is specifically recommended that he be hired as a deck hand. The record does contain another evaluation of Stanton which is undated and lists his position as Deck hand, which seems to indicate that he was hired as a deck hand at some point, but no timeframe is indicated as to how long he was a deck hand at the time of the evaluation. The evaluation describes his skills as "Very Good," and comments that he "Needs more practice with more time he will do just fine."

⁴⁹ Moreover, the evidence appears to indicate that the Employer has not continued the trainee program in recent years because there has been no need to acquire new employees.

effective recommendations that affect employees' job status inasmuch as upper management had a review process and ultimately it was a team effort that decided whether to promote, demote, reward or discipline a crew member.)

With regard to the authority to promote and reward, the record indicates that captains cannot promote an individual to another position or financially reward an employee, but if and when captains evaluate an individual, they can give the person a good recommendation stating that they are ready to advance/change positions. The Employer does not require evaluations on any set time period and has not asked captains to do evaluations for about 2 to 4 years, inasmuch as it does not have open positions to fill. The Employer considers recommendations of all good employees in making a hiring decision. While there is conclusionary evidence that the captains' evaluations of deckhands resulted in deckhands being considered for promotion, there is no specific evidence that a named deckhand was promoted as a result of an evaluation. Additionally, many of the evaluations do not contain any recommendation for a specific personnel action. The Board has held that a mere reporting of performance/skills of an employee without a recommendation for specific personnel action does not establish supervisory status. See e.g., *Harborside Healthcare, Inc.*, 330 NLRB 1334 (2000) (where the Board held that there was no evidence of a direct link between certified nurses' evaluations and job retention or wage increases and that the nurses' role was more akin to that of more experienced lead employees who submit to a higher authority their opinions on the abilities of the employees that they evaluate.). See also, *Chevron, USA*, 309 NLRB 59, 61 (1992) ("An employee does not become a supervisor if his or her participation in personnel actions is limited to a reporting function and there is no

showing that it amounts to an effective recommendation that will affect employees' job status;”) *Ohio Masonic Home*, 295 NLRB 390, 393, 394 (1989) (evaluations assessing employee performance in various job related categories that do not contain any recommendation are not supervisory.) Further, the evidence does not indicate that the Employer is prepared to implement the recommendations without an independent investigation of the relevant circumstances.⁵⁰ In these circumstances, the probative evidence fails to establish that captains have the authority to promote or reward or effectively recommend such actions.

With regard to the authority to discharge, Tug Personnel Manager Haab has told captains that they have the authority to fire crew members. The only instance of a captain exercising the authority to fire/recommend firing an employee of the Employer occurred in about 2006. In this regard, Captain LoPiccolo summarily fired an employee for insubordination where the employee had screamed and cursed at the captain in front of the crew. LoPiccolo's testimony indicates that his action was an exception to what he understood was the normal protocol requiring LoPiccolo to obtain upper management's prior approval.⁵¹ The Board has held that authority that is limited to taking action in response to egregious conduct and flagrant violation of common working conditions, such as being drunk, is insufficient, by itself to establish supervisory status. See *Loffland Brothers, Co.*, 243 NLRB 74, 75 fn. 4 (1979); *Waverly-Cedars Falls Healthcare*, 297 NLRB 390 (1989); *Vencor Hospital-Los Angeles*, 328 NLRB 1136, 1139 (1999). See

⁵⁰ See *Passavant Health Center*, 284 NLRB 887, 891 (1987) (where the Board held that oral and written warnings by nurses merely brought to the employer's attention substandard performances by employees and the director of nursing made an independent evaluation, the role of those delivering the warnings is nothing more than a reporting function.).

⁵¹ The Employer's brief acknowledges that Captain LoPiccolo's testimony indicated that he did not have express authority to take such action; it also notes that LoPiccolo's decision was upheld by the Employer.

also, *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995).⁵² In such cases, the Board has held that independent judgment is not involved because the offenses are “obvious violations of the employer’s policies and speak for themselves.” *Children’s Farm Home*, 324 NLRB 61, 67 (1997). Here, the Employer’s Safety Management System Manual provides that the deckhand is directly responsible to and accountable to the captain or mate, working directly under him/her and following his/her instructions.⁵³ In these circumstances, this isolated incident,⁵⁴ involving a discharge of a deck hand, which was an exception to the Employer’s normal policy, is insufficient to establish supervisory status. See e.g., *Loffland Brothers, Co.*, *supra*. (1979) (where the Board held that an isolated instance of a pusher discharging an employee, contrary to the established policy of reporting such matters to the attention of management, was insufficient to show that the pusher had the authority to either discharge or effectively recommend discipline.)

With regard to the authority to discipline or effectively recommend discipline, the record contains a “Record of Verbal Counseling” issued to deckhand Bonislowski, and a “Written Warning” to mate Golden. The record also contains five additional records of verbal counseling in connection with lateness. While the warnings to Bonislowski and Golden were documented and cautioned further disciplinary action in the event of further misconduct, there is no evidence that the warnings meaningfully affected the disciplined employees’ job status. Further, it appears that the Employer conducted its own independent investigations and met with the disciplined employees prior to signing off on

⁵² In *Chevron Shipping Co.*, *supra*, the Board stated that the authority to order intoxicated or insubordinate employees to leave the workplace does not constitute the statutory authority to discipline employees, as such violations are so egregious and obvious that little independent judgment is needed.

⁵³ The SMS manual also provides, “The deckhand shall obey the commands of the captain and mate, follow all company policy and comply with local, state and federal laws.”

⁵⁴ LoPiccolo was hired as a captain in April 2002, by the Employer. This is the only incident where LoPiccolo was involved in terminating an employee during his employment with the Employer.

the discipline in both cases. In these circumstances, I find that the captain's exercise of discipline does not rise to the level of conferring supervisory status. See *Children's Farm Home*, 324 NLRB 61 (1997) (team leader's issuance of two write-ups that threatened further disciplinary action up to and including immediate discharge, which had no meaningful effect on employee job status, did not confer supervisory status). See also, *Passavant Health Center*, 284 NLRB 887, 890-891 (1987). With regard to the five additional verbal warnings in connection with employee lateness, the evidence shows that the captains advised Tug Personnel Manager Haab of the lateness and Haab apparently carried out the verbal discipline and documented it. The probative evidence does not show that the captains specifically recommended discipline. Inasmuch as the captains' participation is limited to a reporting function and there is no showing that such participation amounts to an effective recommendation that will affect employees' job status, in my view, such mere reporting does not convey supervisory status. See e.g., *Chevron, USA*, 309 NLRB 59, 61 (1992). See also, *Passavant Health Center*, *supra*. (where the Board stated that merely issuing verbal reprimands is too minor a disciplinary function to be statutory authority.)

There is no probative evidence that captains have the authority to transfer employees. With regard to the authority to effectively recommend a transfer, there is general, conclusionary testimony that the Employer has acted on captain's recommendations to transfer a crew member from one vessel to another. However, the evidence tends to show that the Employer did not always act on such recommendations, seeking to avoid simply moving a problem employee from one vessel to another. In this regard, the record contains two examples of a captain requesting that a crew member be

removed from his vessel. There is general testimony that an unnamed captain requested that mate Golden be moved off of his vessel. The Employer moved Golden to Captain LoPiccolo's vessel and Golden was told that this was his last chance.⁵⁵ However, in the second example, a captain recommended that an unnamed deckhand be moved off of his vessel for, among other things, urinating on a toilet seat. Tug Personnel Manager Haab performed an independent investigation and the Employer did not transfer the employee. There is no evidence of any action taken against the deckhand. And, although not entirely clear, in connection with a verbal counseling of deckhand Bonislowski, the evidence indicates that the captain unsuccessfully recommended moving Bonislowski from his vessel. Further, concerning the sole example of a crew member being transferred after a captain's recommendation, the captain involved did not testify, and the testimony of Tug Personnel Manager Haab, that Craig had "issues with the other captain and crew members," is insufficient evidence to determine whether the captain made a recommendation to transfer utilizing independent judgment. And, while the evidence shows that the recommendation of the captain was ultimately followed, there is insufficient evidence to establish that the Employer took the recommended action without independent investigation by upper management. Thus, there is insufficient evidence to show that the captain's input constituted an effective recommendation. In these circumstances, I find that the evidence related to captains recommending crew members be transferred does not confer supervisory status. See *Children's Farm Home*, 324 NLRB 61 (1997) (where the Board held that the authority to effectively recommend generally means that the recommended action is taken without independent investigation

⁵⁵ Evidence of the date, the name of the management official who decided to transfer Golden and the specific circumstances considered in his transfer were not provided. There is hearsay evidence that Engineer Dalton complained about Golden.

by superiors and not simply that the recommendation was ultimately followed); See also *Chevron, U.S.A., Inc., supra*, (where the Board adopted the judge's decision that the employer failed to prove that its decision to transfer a deck hand was the result of a recommendation of a launch captain).

With regard to the assignment of work, the record indicates that management makes the overall assignment of a particular individual to a vessel. The designation of employees to perform significant overall duties is for the most part dictated by the job classification the employer hired the employees to perform. For example, engineers perform engineering/mechanical work and deck hands perform physical labor such as tying the barges together. With regard to appointing an employee to a time, such as a shift, the testimony of Vessel Compliance and Safety Manager Grzybowski and the Employer's Safety Management System Manual indicate that captains assign the crew to watch shifts. However, the Safety Management System contains an entire section on Watch Standing Policy and Procedures. The Safety Management System Manual section on Watch Standing Policy and Procedures, sets forth "three section duty" for deck hands, with each watch consisting of 6 hours in duration; the rotation will be on watch, on standby, on watch and off watch.⁵⁶ And, Vessel Compliance and Safety Manager Grzybowski testified that the hours of the crew members are established based on the type of work the individual performs, i.e., the captain takes the morning shift and the mate goes to bed. The engineer typically works when the captain is on and the three deck hands work out their rotation based on prior practice.⁵⁷ Thus, even assuming captains "assign" crew members to a watch within the meaning of Section 2(11) of the Act, the

⁵⁶ The Safety Management System Manual recommends deck hands work schedule should not exceed 15 hours in any 24 hour period.

⁵⁷ Any disputes are ultimately resolved by the captain.

record does not support a finding that such assignment is carried out with independent judgment. Proof of independent judgment in the assignment of employees entails the submission of concrete evidence showing how assignment decisions are made. See *Harborside Healthcare, Inc.*, 330 NLRB 1334 (2000); *Crittenton Hospital*, 328 NLRB 879 (1999). An assignment in accordance with an Employer's set practice, pattern or parameters, or based on routine or obvious factors, does not require a sufficient exercise of independent judgment to satisfy the statutory definition. See *Express Messenger Systems*, 301 NLRB 651, 654 (1991); *Bay Area-Los Angeles Express*, 275 NLRB 1063, 1075 (1985). Thus, it appears that the captain's setting the watch is repetitive and largely controlled by the Employer's written policies. Accordingly, in my view, the general evidence that the captain sets the watch does not confer supervisory status.

The Employer, in its brief points to the testimony of employee Cutten that when serving as captain, he "assigns" tasks to crewmembers and the testimony of Captain Piccolo that the captain/ master of the vessel is responsible for the crew performing their duties. The record evidence that the Employer points to in this connection indicates that instead of "assigning" work, captains direct crewmembers, i.e., they generally oversee the crew members, decide what task shall be undertaken next and who shall do the task, including *ad hoc* instructions to perform discrete tasks. More specifically, Cutten provided as an example his telling deckhands to take a pump out to a scow in tow and pump out any water in the scow. Cutten testified that this work would usually be assigned to the deck hand on watch or the deck hand on standby. In this regard, the record evidence indicates that the crewmembers know what they are supposed to do and the evidence does not indicate under what circumstances the captain would use the deck

hand on standby rather than the deck hand on watch to perform certain tasks. Thus, the record lacks evidence to show that the captain uses independent judgment when deciding which deckhand should pump out the scow. Further, the evidence shows that captains direct the crew while organizing the tow line. While the evidence here shows that captains assign specific tasks, the assignments appear to be repetitive in nature and based on skills that were defined by the job classifications. Thus, the evidence does not indicate that the determination as to which employee will do the work is based on anything other than obvious or routine factors. Accordingly, there is insufficient evidence to establish that captains exercise independent judgment in assigning tasks (such as pumping out a scow or organizing a tow line) to convey supervisory status. Further, while the record contains testimony that the captain is “responsible” for the crew performing their duties, such evidence is insufficient to establish that captains are actually held accountable for their direction of employees. See *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006) (where the Board held that in the absence of any evidence of actual or prospective consequences to the terms and conditions of employment of the putative supervisors, such consequences are “merely speculative and insufficient to establish accountability.”) Compare *Croft Metals, Inc.*, 348 NLRB at 722 (where supervisors received written warnings based on the shortcomings of their crew, the actual accountability standard is met.)

Similarly, the record indicates that it is the captain’s responsibility to make navigational decisions and that captains exercise their authority to direct crew members to perform tasks involving the navigation of the vessel. Weather, the number of barges being pushed and the weight of the barges are taken into account by the captain in

navigating the boat safely. In this regard, the record indicates that a captain, as part of the safe navigation of the boat, can use his discretion to order the crew to perform particular tasks, such as standing lookout.⁵⁸ The captain can decide when to direct a crew member to stand lookout, i.e. when visibility is one quarter of a mile, and where to post the lookout; the captain decides how many lookouts to post and who he wants to use as a lookout, i.e., someone on watch already or someone who was not on watch, i.e., a deck hand on standby. The captain may also ask a deck hand to ride a barge if visibility is poor and he needs to “see” a dock through a lookout. Thus, the navigational decisions that the captain makes determine the tasks that crew members need to perform. The directives of the captain require the exercise of independent judgment inasmuch as situations are unpredictable, i.e., due to weather conditions⁵⁹ and the captain acts in the interest of the Employer in the navigation and safety of the Employer’s vessel. The captain does not check with others before ordering action be taken. The Board has held that while such directives are based on extensive training, experience and skill as a navigator, this is not inconsistent with their exercise of independent judgment in directing the work of the crew. However, the element of accountability has not been established. Indeed, there is no evidence that the captains are evaluated on their crewmembers’ performance. See *Golden Crest Healthcare Center*, 348 NLRB 727 (2006); *Regal Health and Rehab Center, Inc.*, 354 NLRB No. 71 (2009). Thus, the evidence is insufficient to establish that captains responsibly direct employees in the performance of tasks concerning the safe navigation of the vessel. *Chevron USA*, 309 NLRB 59 (1992) (where there was a

⁵⁸ All crew members are trained to be lookouts.

⁵⁹ In *American River*, 347 NLRB 925 (2006), the Board noted the fact “That the pilots’ orders are based on their extensive training, experience and skill as navigators is not inconsistent with their exercise of independent judgment in directing and assigning the work of the crew.”

lack of evidence that launch captains were held accountable for the performance of other employees)

Further, the record indicates that captains give orders so that the vessel is operated in a safe manner and in compliance with the Employer's safety policy and United States Coast Guard Rules and Regulations. In this regard, captains direct employees to wear safety vests in their standing orders in compliance with the Employer's Safety Management System. With regard to Coast Guard rules and regulations, if a tow hawser is incorrectly handled by the deck hands, the captain is subject to having his license suspended by the Coast Guard for violating regulations under U.S. code stipulations. Further, the captain is responsible to prevent the pollution of waters and if a deck hand mishandles refuse, the captain can be penalized by the Coast Guard. However, the record does not specify how the captain is held accountable if employees do not wear their safety vests. Similarly, with respect to accountability in connection with the violation of Coast Guard regulations, there is no probative evidence as to whether the Employer penalizes the captain in addition to the Coast Guard's action taken against the captain. Inasmuch as there is no evidence regarding adverse consequences taken by the Employer if the tow hawser or refuse is mishandled, the Employer has failed to prove that captains are held accountable for their direction of crewmembers in connection with the tow hawser or the disposal of refuse. Further, it appears that the Board has held that United States Coast Guard regulations related to the tow hawser do not confer supervisory status inasmuch as the direction of personnel in this regard was in most cases predetermined and routine in nature and does not require the use of independent judgment. See *Spentonbush/Red Star Companies*, 319 NLRB 988 (1995) enforcement denied 106 F.3d

484 (Cir. 2 1997) Further, in *Oakwood, supra*, the Board held that the exercise of the authority to direct work must not be routine or clerical in nature, but requires the use of independent judgment. And, in *Oakwood, supra*, the Board held that for the judgment to be independent, it must be “free of the control of others” and not be dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.” Here the Employer’s direction of work in relation to the tow hawser and refuse handling are dictated and controlled by the Coast Guard regulations and company policy. Thus, in my view, there is insufficient evidence that the captains would exercise independent judgment⁶⁰ related to the length of the tow hawser and refuse disposal. Accordingly, there is insufficient evidence to establish that the captains’ direction of crewmembers with respect to the tow hawser or refuse confers supervisory status. See *Spentonbush/Red Star Companies*, 319 NLRB 988 (1995) enforcement denied 106 F.3d 484 (Cir. 2 1997) (where the Board held that tug boat captains direction of work of

⁶⁰ I note that in denying enforcement of the Board’s order in *Spentonbush/Red Star Companies*, 319 NLRB 988 (1995), the United States Court of Appeals, Second Circuit, acknowledged that an individual does not responsibly direct employees unless he/she is held responsible in the sense of being fully accountable or answerable for the performance and work product of the employees he/she directs. In its discussion concerning illustrations of how tug masters are held accountable and responsible for the performance of tug employees, it noted deckhands’ handling of tow hawsers which can result in the captain having his license suspended for violating Coast Guard regulations. The Court found no merit in an argument that the responsibilities regarding the tow hawser and refuse handling were imposed by law, not the employer, assuming that Spentonbush intended and required that its masters obey the maritime and navigation law and such obedience was in Spentonbush’s interest. The Court did not specifically address the absence of consequences imposed by the Employer. *Spentonbush/Red Star Co., v. NLRB*, 106 F.3d at 490 (2nd Cir. 1997). Thereafter, as noted above, the Board refined its analysis of the terms “assign,” “responsibly direct” and “independent judgment” within the meaning of Section 2(11). Significantly, as noted above, the Board’s analysis of accountability for the purposes of establishing responsible direction requires evidence of actual or prospective consequences to the terms and conditions of employment of the putative supervisors. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006). There is insufficient evidence to establish that penalties related to improper disposal of refuse would affect the terms and conditions of employment of the captains. The Employer did not present any evidence as to what action, if any, it would take if a captain’s license was suspended. Moreover, there is no evidence that a captain’s license was ever suspended by the Coast Guard due to a deckhand’s improper handling of a tow hawser and such speculative evidence is insufficient to confer supervisory status.

crewmembers, which included performance of work with a tow hawser, did not involve independent judgment.)

The Employer sought to introduce evidence that the captain of a vessel is ultimately responsible for everything on the vessel, inasmuch as he signs off on various paperwork such as a Daily Payroll Memorandum,⁶¹ Pre-Underway Checklist, Voyage Plan and Captain's Oil Transfer Authorization and he is required to publish Standard Operating Procedures, Standing Orders and Night Orders. However, there is insufficient evidence to establish that captains are actually held accountable for their direction of employees related thereto. See *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006).

Additionally, although there is evidence that the captain has the authority to refuse to sail if the vessel is not ready to proceed inasmuch Captain Rod Bissen ordered raising the height of the vessel perimeter tires, delaying the departure of the tug by about three hours, there is no direct evidence that the crewmembers under Captain Bissen were involved in this maintenance issue.⁶² It is the authority over employees, not the control of equipment, that is relevant in determining whether the captains possess any of the authority enumerated in Section 2(11) of the Act. Accordingly, I find the evidence on which the Employer relies is insufficient to establish that captains exercise independent judgment in the direction of the crewmembers' work.

⁶¹ The captain's responsibilities to record the crewmembers' hours, to verify the accuracy of those hours and submit them to the human resources manager are routine and clerical in nature and insufficient to establish supervisory status. See *Chevron USA*, 309 NLRB 59, 68 fn. 11 (1992).

⁶² There is no indication that the captain directed crew members to perform any work in connection with this delay.

Based on the foregoing and the record as a whole, I conclude that the Employer has not met its burden of proving that captains are supervisors as defined in Section 2(11) the Act.

CONCLUSIONS AND FINDINGS

Upon the entire record in this proceeding, the undersigned finds:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.

2. The parties stipulated that the Employer, a Delaware corporation, with its principal office and place of business located at 39 Ferry Street, New Haven, Connecticut, is engaged in the interstate transportation of aggregate via its tug boats and barges. During the past year, which period is representative of its annual operations generally, the Employer, performed services valued in excess of \$50,000 to its customers located in States other than Delaware.

Based on the parties' stipulation, and the record as a whole, I find that the Employer is engaged in commerce within the meaning of the Act. It will therefore effectuate purposes of the Act to assert jurisdiction in this case.

3. The parties stipulated that the Union is a labor organization as defined in Section 2(5) of the Act. The Union claims to represent certain employees of the Employer.

4. Based on the foregoing discussion, I will not grant the Employer-Petitioner's petition to clarify the bargaining unit.

ORDER

IT IS HEREBY ORDERED that the bargaining unit of employee employed by the Employer-Petitioner and represented by the Union is not clarified to exclude the position of captain.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **June 16, 2010**. The request may **not** be filed by facsimile.

The parties are advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file the above-described Request for Review electronically, please refer to the guidance which can be found under "E-Gov" on the National Labor Relations Board website: www.nlr.gov.

Dated: June 2, 2010.

Alvin Blyer
Regional Director, Region 29
National Labor Relations Board
Two MetroTech Center, 5th Floor
Brooklyn, New York 11201